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JUN 1 1959
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In The

Supreme Court of the United States

October Term, 1958

No. 166

PENNSYLVANIA LABOR RELATIONS BOARD,

Petitioner

v.

AUGUST A. NAPOLI, Trading and Doing Business as Seven-Up Bottling Company,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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INDEX

	Page
Petition for Writ of Certiorari:	
Citations to Opinions Below	2
Jurisdiction	2
Questions Presented	3
Constitutional Provision and Statute Involved	4
Statement of the Case	5
Reasons for Granting the Writ	8
Conclusion	12
Appendix A—Opinion of the Supreme Court	13

TABLE OF CITATIONS

Cases:

Amalgamated Meat Cutters & Butcher Workmen of North America, Local No. 427, AFL et al. v. Fairlawn Meats, Inc., 353 U.S. 20, 22, 23 (1957) 9

Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957) 8

National Labor Relations Board v. Denver Building and Construction Trades Council, 341 U.S. 675, 684, 685 (1951) 9

National Labor Relations Board v. Fainblatt et al., 306 U.S. 601 (1939) 6, 8, 9

National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1 (1937) 8

Pennsylvania Labor Relations Board v. Irving J. Friedberg et al., 395 Pa. 294 (1959) 11, 12

STATUTES:

28 U.S.C., Sec. 1257 (3) 2

Labor-Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C., Secs. 141 et seq. 4

Pennsylvania Labor Relations Act, Act of June 1, 1937 (P.L. 1168), 43 P.S. 211.1 et seq. 5

CONSTITUTION:

Constitution of the United States, Art. I, Sec. 8 4

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The Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania, entered in the above-entitled case on April 20, 1959.

CITATIONS TO OPINIONS BELOW

The Nisi Decision and Order Sustaining Jurisdiction of the Pennsylvania Labor Relations Board, hereinafter called the "Board" (R. 151a), and the Final Decision and Order of the Board (R. 160a), are unreported. The opinion of the Court of Common Pleas of Westmoreland County (R. 174a) is reported at 40 Westmoreland Law Journal 169. The opinion of the Supreme Court of Pennsylvania, printed as Appendix A hereto, is reported at 395 Pa. 301.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on April 20, 1959. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257 (3), since a ". . . title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of . . . the United States."

QUESTIONS PRESENTED

I. Does the Pennsylvania Labor Relations Board have jurisdiction over a Pennsylvania soft drink bottler and distributor who has ten (10) employes, where all sales are made inside Pennsylvania, and purchases of supplies for the relevant annual period from outside Pennsylvania, both direct and indirect, amount to $43,879.59?

(a) Is the impact of such a business on interstate commerce *de minimis* within the meaning of applicable decisions of this Court and, therefore, insufficient to bring the enterprise within the jurisdiction of the National Labor Relations Board?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The constitutional provision involved is Article I, Section 8, of the Constitution of the United States:

> "The Congress shall have power . . . To regulate Commerce . . . among the several states. . . ".

The statute involved is the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C., Sections 141, et seq., the pertinent provisions of which are:

> "The (National Labor Relations) Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice . . . affecting commerce . . ." (61 Stat. 146, 22 U.S.C., Section 160 (a))
>
> "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." (61 Stat. 137, 29 U.S.C., Section 152 (7)).
>
> "The term 'commerce' means trade, traffic, commerce, transportation, or commerce among the several states . . ." (61 Stat. 137, 29 U.S.C., Section 152 (6))

STATEMENT OF THE CASE

After appropriate proceedings under the Pennsylvania Labor Relations Act (Act of June 1, 1937, P.L. 1168, as amended, 43 P.S., Section 211.1 et seq.), the Board issued its Final Decision and Order on September 12, 1957, finding the Respondent guilty of unfair labor practices (R. 160a). The Respondent filed a petition for review in Court of Common Pleas of Westmoreland County (R. 163a), raising, *inter alia*, the question of the Board's jurisdiction in the matter. On May 26, 1958, that Court, without considering the merits, reversed the Board's Order on the ground that the Board had no jurisdiction over the Respondent (40 Westmoreland Law Journal 169; R. 174a). The Board thereupon appealed to the Supreme Court of Pennsylvania which, on April 20, 1959, affirmed (395 Pa. 301, and printed as Appendix A).[1]

The Respondent is a bottler and distributor of a soft drink, Seven-Up, in New Kensington, Pennsylvania (R. 153a). He has ten (10) employes (R. 136a), and for the calendar year 1956 he had total sales of $102,686.24, all inside Pennsylvania (R. 153a). In the same year, his total purchases amounted to $51,384.75, of

[1] It is this case in which certiorari is sought—No. 230 March Term, 1958, in the Supreme Court of Pennsylvania. There were two other cases before the Supreme Court of Pennsylvania—Nos. 229 and 231 March Term, 1958. These involved representation matters and the decision of both courts below in the unfair labor practice case (No. 230) was determinative of the other two cases.

which $7,505.16 represented purchases inside Pennsylvania of products having a Pennsylvania origin (R. 134a). $33,553.24 of the Respondent's 1956 purchases represented shipments to the Respondent from points outside Pennsylvania (R. 132a, 133a), and the remaining 1956 purchases, $10,326.85, represented purchases inside Pennsylvania of products having an out-of-state origin (R. 134a).

In the courts below, the Board contended that the impact of the Respondent's business upon interstate commerce was *de minimis* within the meaning of *National Labor Relations Board v. Fainblatt et al.*, 306 U.S. 601 (1939), and other United States Supreme Court cases; that the National Labor Relations Board did not, therefore, have jurisdiction over the Respondent; and that the Respondent was subject to the Board's jurisdiction. This contention was specifically rejected, both by the Common Pleas Court of Westmoreland County and the Supreme Court of Pennsylvania. The Supreme Court held that the business of the Respondent ". . . 'affects commerce' so that the National Labor Relations Board has exclusive jurisdiction over it in the matter of labor practices even though the National Board would not take jurisdiction because of its jurisdictional minimum."

How Federal Question Is Presented

The Respondent first denied the Board's jurisdiction in his Answer to Complaint (R. 16a), and reiterated this position, contending that the National Labor Relations Board has jurisdiction over the Respondent,

in his Exceptions to the Board's Nisi Order (R. 147a, 148a). The Board rejected this argument on the ground that a labor dispute involving the Respondent would not affect the flow of interstate commerce (R. 155a). The Respondent raised the same jurisdictional question in its Petition for Review in the Court of Common Pleas of Westmoreland County (R. 165a, 166a, 167a); and that Court held that the Respondent's out-of-state purchases were not negligible, that the *de minimis* doctrine was not applicable and that the Board had no jurisdiction in the matter (R. 181a). The same issue was presented on appeal to the Supreme Court of Pennsylvania with the same result (see Appendix A).

REASONS FOR GRANTING THE WRIT

Ever since the passage of the National Labor Relations Act in 1935, there has been confusion in the labor relations field as to the area pre-empted by the Federal Government and the area reserved to the jurisdiction of the several states. Approximately one-quarter of the states have adopted labor legislation more or less modeled on the original "Wagner Act", and until 1957 it was the general practice of these state boards to assert jurisdiction in all cases where the National Labor Relations Board, by the establishment of minimum jurisdictional criteria or otherwise, refused to exercise its jurisdiction.

Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957), and companion cases, decided that the state boards did not automatically become vested with jurisdiction merely because the National Labor Relations Board declined to assert its jurisdiction. This Court, while deploring the creation of a "no-man's land", held that the state boards had no power to deal with cases *where the business involved affected commerce within the meaning of the National Labor Relations Act.*

This Court has made it abundantly clear, from *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937), and the *Fainblatt* case, supra, to the present time, that Congress, in enacting the National Labor Relations Act, intended to and did confer upon the National Labor Relations

Board all of the power of the Federal Government under the Commerce Clause of the Constitution. The *de minimis* limitation on this broad grant of power was first stated by Mr. Justice (later Chief Justice) Stone in the *Fainblatt* case, supra (306 U.S. at 607):

> ". . . Examining the Act in the light of its purpose and of the circumstances in which it must be applied we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected *more than that to which courts would apply the maxim de minimis.*" (Emphasis supplied.)

Although this limiting doctrine has been adverted to by this Court on various occasions since 1939 (e.g. *National Labor Relations Board v. Denver Building and Construction Trades Council*, 341 U.S. 675, 684, 685 (1951); *Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 427, AFL et al. v. Fairlawn Meats, Inc.*, 353 U.S. 20, 22, 23 (1957)), the Court has not as yet been called upon to stake out that lower boundary.

The determination of what, if any, labor relations jurisdiction is left to the states is obviously an important question. It could be said that practically every business enterprise "affects interstate commerce". If such an approach to the problem prevails, the doctrine of *de minimis* has no practical application; and the various state labor relations laws would be completely inoperative. On the other hand, it can be said that the true test is to ask what will be the effect on interstate commerce if a labor dispute causes

an interruption in the business of the subject enterprise. If this effect is negligible, or *de minimis*, then the states have jurisdiction. The Petitioner believes that this case is one in which such effect is negligible or *de minimis*.

The essential holding of the Supreme Court of Pennsylvania in this case is that a soft drink bottler and distributor, all of whose sales are inside the state and who purchases approximately $44,000 worth of materials annually from outside the state, is not subject to Petitioner's jurisdiction. The court below expressly held that this volume of out-of-state purchases could not be called *de minimis*, and that the respondent was, therefore, under the jurisdiction of the National Labor Relations Board. The Petitioner believes this was error. A soft drink concern of the kind involved here is essentially a local enterprise, of the same character as the corner drug or grocery store or the bakery. The volume of its out-of-state purchases is insignificant compared to the vast flow of goods in interstate commerce, and to say that an interruption in the Respondent's business because of a labor dispute would have any more than a negligible or *de minimis* effect on interstate commerce is to be utterly unrealistic. It should be noted, in this connection, that this Court has never upheld the jurisdiction of the National Labor Relations Board in any case where the impact of the enterprise involved upon interstate commerce was so trivial.

The court below emphasized on two occasions that the Respondent's out-of-state purchases constituted 85 percent of all its purchases. It is submitted that this is completely irrelevant. Even if a company's

total purchases were made out-of-state, it is the volume of such purchases that is material. One hundred percent (100%) of $5,000 is negligible, but 5 percent of $10,000,000 is certainly substantial. The Petitioner brings this matter to the Court's attention because many of the lower courts have emphasized this percentage factor. *Cf.* the decision of the Westmoreland County Court of Common Pleas (R. 176a, 180a, 181a); *PLRB v. Friedberg et al. (No. 1)*, 72 Dauphin Co. Rep. 127, 129, 137 (Pa. 1958).

Fundamentally, the Petitioner maintains that there is a place for the states in the labor relations field, that enterprises such as the one here involved are essentially local in character and their impact on interstate commerce is negligible; and that the effect of the Pennsylvania Supreme Court's decision in this case, as a practical matter, is to give the Federal Government complete jurisdiction over labor relations. If the line cannot be drawn here it cannot be drawn any place, and effective control over labor relations in the small business area must be completely dependent on adequate appropriations from Congress to permit the National Labor Relations Board to operate at the corner-drug-store level.

It is common knowledge that the "no-man's land" question is the subject of active legislative consideration. At this writing there is no assurance that Congress will enact any legislation which will clarify the situation. Under these circumstances it seems to the Petitioner that there are the most imperative considerations for this Court to grant the writ of certiorari in this case.

The Court's attention should also be called to the fact that the instant case is one of two on the same subject decided by the Pennsylvania Supreme Court in the space of one month. In the other case, *Pennsylvania Labor Relations Board v. Irving J. Friedberg et al.*, 395 Pa. 294 (1959), the Pennsylvania Supreme Court, reversing a lower court determination, upheld the Board's jurisdiction on the ground that the effect on commerce of the business there involved was *de minimis*. The *Friedberg* case is presently on direct appeal to this Court (Notice of appeal filed June 2, 1959). By granting the prayer of the present petition, the Court will have before it two cases from the highest court of one state in which the state court drew what it considered to be the line which properly divides the area in which the state may act from that in which it may not. No better opportunity could be presented to this Court to speak with final certainty regarding the power of state labor relations boards to act since application of the *de minimis* doctrine would be squarely in question.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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June, 1959.

APPENDIX A—OPINION OF THE SUPREME COURT OF PENNSYLVANIA

Opinion by Mr. Justice Cohen, April 20, 1959:

These appeals were taken by the Pennsylvania Labor Relations Board from decisions of the Court of Common Pleas of Westmoreland County setting aside the orders made by the board in three companion cases.

In the first case, the board made a decision and order sustaining the charge by the General Teamsters Union, Local 249, AFL-CIO that appellee August A. Napoli, trading and doing business as Seven-Up Bottling Company of New Kensington (hereinafter called employer), had engaged in unfair labor practices within the meaning of the Pennsylvania Labor Relations Act of June 1, 1937, P. L. 1168, 43 P.S. §211.1 *et seq.* The second and third cases involved the dismissal by the board of a petition for investigation and certification of representatives which was filed by Brewery and Soft Drink Workers, Local No. 86, of the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO. Following these decisions, the employer filed petitions for review of the board's final orders in the Court of Common Pleas of Westmoreland County. The court held that the board had no jurisdiction over the employer and set aside the orders.

The facts are not in dispute. Employer is a distributor of Seven-Up soft drink in New Kensington,

Pennsylvania, and is franchised by the Seven-Up Company in St. Louis, Missouri. The franchise agreement provides that employer must purchase its Seven-Up from the St. Louis company. Also, the St. Louis company may cancel the franchise, if the employer fails to comply with its policies relating to extract, quality control and cleanliness.

Employer had gross receipts of $102,686.24 from his sales to retail stores, clubs, gas stations and vending machines in New Kensington during 1956. His direct purchases from out-of-state suppliers amounted to $33,553.24 and his indirect purchases from outside the state amounted to $10,326.35 during the same year. The total of all his purchases for 1956 was $51,384.75; hence, those which represented out-of-state dealings represented 85% of the total.

The sole question presented by these appeals is whether or not the Pennsylvania Labor Relations Board had jurisdiction over this employer. This is the same question with which we dealt in *Pennsylvania Labor Relations Board v. Friedberg*, 395 Pa. 294, A. 2d (1959): whether or not the employer's business affects commerce as defined in Labor Management Relations Act of 1947, 61 Stat. 137 (1947), 29 U.S.C.A. §152(7) (1952).[1]

Where the activity of an employer affects or may affect commerce, state labor relations boards do not

[1] The term affecting commerce is defined as "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

have jurisdiction over labor disputes. As we pointed out in the *Friedberg* case, the field is pre-empted by the Federal Government which invested the National Labor Relations Board with exclusive jurisdiction and this exclusiveness exists even though the National Board refuses to assert its jurisdiction because of its self-imposed standards. *Guss v. Utah Labor Relations Board*, 353 U.S. 1 (1957); *Hodges Bedding Company v. Pennsylvania Labor Relations Board*, 388 Pa. 333, 131 A. 2d 93 (1957).

There is no question but that the employer in this appeal is engaged in an activity which materially "affects commerce". *National Labor Relations Board v. Seven-Up Bottling Company of Miami*, 196 Fed. 2d 424 (5th Cir. 1952). His business operates under a franchise agreement with a national company and 85% of all his purchases are from out-of-state.

Appellant argues that employer's activities were *de minimis* and hence, is not included in the jurisdiction of the National Labor Relations Board. In the *Friedberg* case we held that a local window washers' activities were *de minimis* and did not "affect commerce", therefore, holding that the Pennsylvania Board's jurisdiction was not ousted. The facts in the instant case clearly show that the employer's business is quite different from that of the employer in *Friedberg*. Here the employer is engaged in a non-retail manufacturing business while in *Friedberg* the employer was engaged in selling a service. Also, in *Friedberg*, the employer's only connection with interstate commerce was indirect—he had no connection with nor was he under the control of any national busi-

ness as the employer in this case. Here the employer is manufacturing and distributing a nationally advertised product and purchases approximately $44,000.00 worth of supplies from outside the state. These differences are basic in the determination of whether or not an employer is engaged in an activity "affecting commerce" within the meaning of the national act.

For the above reasons it is clear to this Court that the employer is engaged in the business which "affects commerce" so that the National Labor Relations Board has exclusive jurisdiction over it in the matter of labor practices even though the National Board would not take jurisdiction because of its jurisdictional minimum.

Orders affirmed.